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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 553

JOSEPH GALLOWAY, BY FREDA GALLOWAY, HIS GUARDIAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF.

WARREN E. MILLER,
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PETITIONER'S BRIEF.

Opinion Below.

There is no opinion by the District Court at the time it granted defendant's motion for directed verdict (R. 12).

The opinion of the Circuit Court of Appeals (R. 135, 141) is reported in 130 F. 2d 467.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered September 1, 1942 (R. 142). The petition for the

writ of certiorari was filed November 28, 1942, and granted January 4, 1943.

Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

Whether the Circuit Court of Appeals violated the general common law relating to trials by jury and denied trial by jury to petitioner in violation of the Seventh Amendment of the Federal Constitution in determining that there was no evidence upon which the jury might find petitioner totally and permanently disabled, thus usurping the functions of the jury by invading its province.

Provisions of the Constitution, Statutes and Regulation Involved.

The Seventh Amendment to the Federal Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Section 400 of the Act of October 6, 1917, c. 105, 40 Stat. 398, 409, provides as follows:

> That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protections for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total perma-

> nent disability of any such person in any multiple of $500 and not less than $1,000 or more than $10,000, upon payment of the premiums as hereinafter provided.

This section was restated in substance in subsequent amendments (U. S. C., Title 38, Sec. 511; U. S. C., Sup. VII, Title 38, Sec. 511).

In Treasury Decision 20, Bureau of War Risk Insurance, dated March 9, 1918, "permanent and total disability" was defined as follows:

> "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed * * * to be total disability.
>
> "Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *"

Title 28, U. S. C. A., Supp. Section 445 provides:

> "In the event of disagreements as to claim, including claim for refund of premiums, under a contract of insurance between the Veterans' Administration and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the district court of the United States for the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies."

Statement.

The petitioner filed suit (R. 1-5) against the United States upon the War Risk Term Insurance contract of Joseph Galloway, hereinafter referred to as the insured, for total and permanent disability benefits under the terms

of his said contract of insurance, claiming benefits (R. 3) from April 29, 1919, in the amount of $57.50 per month.

At the conclusion of the evidence, respondent moved for a directed verdict (R. 12) whereupon the Court instructed the jury to return a verdict in favor of the respondent. Petitioner appealed.

The United States Circuit Court of Appeals for the Ninth Circuit, in the decision now being reviewed (R. 135-141), reported in 130 F. 2d 467, held that the evidence of the petitioner, when considered in its most favorable aspects, required the direction of a verdict in favor of respondent.

Argument.

The evidence, when considered in its most favorable aspects, required the submission of this case to the jury as there was a substantial evidence that the insured was totally and permanently disabled prior to May 31, 1919 (R. 15).

For the convenience of the Court, reference is made in the appendix of this brief to the substantial testimony of plaintiff's seven witnesses, segregated in time sequence.

The latest pronouncements of this Court in similar cases are set forth in the cases of *Halliday* v. *United States*, 315 U.S. 94, 62 S.Ct. 438, 86 L.Ed. 393, and *Berry* v. *United States*, 312 U.S. 450, 61 S.Ct. 637, 85 L.Ed. 945.

In *Halliday* v. *United States*, as in this case, the insured was insane. The facts in that case, while strikingly similar to the facts in the case at bar, are not nearly as strong as the facts here. There, total and permanent disability was claimed from April 2, 1919, and here it is claimed from a date prior to May 31, 1919 (R.15).

In the Halliday case until as late as 1924, no diagnosis of mental or nervous disorder was made and no irrational

act was noted. And as late as 1924, a searching examination resulted in a definite finding that there was no neuropsychiatric disability. In the instant case, there are numerous irrational acts noted by witnesses who related them, occurring while this insurance was in force.

In the Halliday case the insured was found to be mentally competent following observation in a mental hospital after a period of thirty days in 1936, having been adjudicated incompetent in 1935. While here, even the Court below (R.141) assumed that the insured has been totally and permanently disabled since February 11, 1932, the date of the appointment of the guardian.

In the *Halliday* case the respondent urgede that the opinion testimony of Halliday's physician had no probative force and urged this Court that it was without foundation and opposed to the undisputed facts. This Court, however, recognized the doctor's testimony in the Halliday case. Here, the testimony of the physician, which was not contradicted by any other testimony, showed that this man was insane in April or May 1919 (R. 96, 97) and a witness who served with him in France testified that he was out of his mind and appeared insane (R. 46) in June 1918.

In their opinion, the Court below says:

> "• • • To meet the requirement that the plaintiff 'must show, by evidence contemporaneous with the life of the policy, the then totality and permanence of his disability,' (*Wise* v. *United States*, 5 Cir., 63 F. 2d 307, 308; *Cunningham* v. *United States*, 5 Cir., 67 F. 2d 714, 715) the plaintiff offered the testimony of three persons, two of them by deposition. Two of the witnesses were comrades in arms, and each testifies to isolated incidents wherein it is said Galloway did not behave in a rational manner. But it is obvious that an instance or two of hysteria or uncontrolled emotion during a period of tension is not proof of total permanent disability by reason of insanity. Similarly, ob-

servation by a friend, even of long standing, of the plaintiff's conduct upon return from service, given many years later, and in the knowledge of the present condition of the veteran, is not proof of the total permanent disability of the insured at a period when the policy was in force. This is an example of 'the danger of confusing a later condition with an earlier one.' *United States* v. *Brown*, 1 Cir., 76 F. 2d 352, 353. Moreover, no matter how accurate the medical expert's diagnosis of the present condition of the plaintiff, his opinion respecting the totality and permanency of Galloway's disability, if such existed, in April, 1919, amounts to what has been termed a 'long range retroactive diagnosis', and rests upon inference and probabilities."

It will thus be seen that after weighing the substantial evidence consisting of the testimony of these witnesses, the Circuit Court of Appeals discarded it, which action petitioner claims was not only erroneous and deprived petitioner of his right to a jury trial as granted by our Constitution, but was also contrary to the previous decision of this Court in *Halliday* v. *United States*.

The remarks of this Court with reference to total permanent disability in the strikingly similar case of *Halliday* v. *United States* are believed applicable here.

> "*While it is true that total and permanent disability prior to the expiration of the insurance contract must be established, evidence as to petitioner's conduct and condition during the ensuing years is certainly relevant. It is a commonplace that one's state of mind is not always discernible in immediate events and appearances, and that its measurement must often await a slow unfolding. This difficulty of diagnosis and the essential charity of ordinary men may frequently combine to delay the frank recognition of a diseased mind.* Moreover, the totality and particularly the permanence of the disability as of 1920 are susceptible of no better proof than that to be found in petitioner's personal history for the ensuing 15 years." (Italics supplied.)

In their decision the Court below says:

> "We believe that the plaintiff's two enlistments subsequent to the lapse of his policy, and his period of service in the Navy and in the Army, are such physical facts as refute any reasonable inferences which may be drawn from the evidence here presented by him that he was *totally* and *permanently* disabled during the life of his policy. Another failure in appellant's case is the utter lack of any evidence at all respecting Galloway's work record between his last discharge from the Army and the appointment of a guardian over him, a period of nearly ten years. It must be remembered, also, that Galloway married in 1929, long after he is claimed to have become totally and permanently disabled by reason of insanity. * * *"

In this respect this Court in the *Halliday* case, *supra*, says:

> "In support of its conclusion the Circuit Court of Appeals observed that 'insured's failure to secure adequate hospitalization' leaves it 'highly speculative whether insured's ailments, whatever these may have been, would not have been cured by the medical treatment which was in his potential grasp.' There can be no doubt that evidence of the failure of attempted treatment would have been highly persuasive of the permanence of petitioner's disability. And the jury was entitled to draw inferences unfavorable to his claim from the absence of such evidence. However, this was but one of the many factors which the jury was free to consider in reaching its verdict. In the face of evidence of a mental disorder of more than 15 years duration it can hardly be said that the absence of this single element of proof was fatal to petitioner's claim. Moreover, inferences from failure to seek hospitalization and treatment must be drawn with the utmost caution in cases of mental disorder, where, as here, there is reason to believe that one of the manifestations of the very sickness itself is fear and suspicion of hospitals and institutions."

It is submitted that the foregoing language of this Court in the *Halliday* case is applicable by analogy to the instant case.

This Court, in *Berry* v. *United States*, 312 U. S. 450, 61 S. Ct. 637, 85 L. Ed. 945, clearly states the rule as to what constitutes total permanent disability, as follows (61 S. Ct. 637, 639):

> "It was not necessary that petitioner be bed-ridden, wholly helpless, or that he should abandon every possible effort to work in order for the jury to find that he was totally and permanently disabled. It cannot be doubted that if petitioner had refrained from trying to do any work at all, and the same evidence of physical impairment which appears in this record had been offered, a jury could have properly found him totally and permanently disabled. And the jury could have found that his efforts to work—all of which sooner or later resulted in failure—were made not because of his ability to work but because of his unwillingness to live a life of idleness, even though totally and permanently disabled within the meaning of his policies. Nor does the fact that he waited thirteen years before bringing suit stand as an insuperable barrier to his recovery. His case was not barred by any statute of limitations. • • •"

The Circuit Court in their decision fail to maintain either the *Berry* or *Halliday* cases, although vehemently stressed by petitioner's counsel before that Court.

The Circuit Court has completely ignored the basic rule reiterated by this Court in *Gunning* v. *Cooley*, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 721, to the effect that the jury are the sole and exclusive judges as to the creditability, weight, and effect of the evidence, and by their decision have on the contrary sought to evaluate petitioner's evidence and to resolve conflicts in the same, contrary to all decisions of this Court, as well as their own decisions. See *Gunning* v. *Cooley, supra; United States* v. *Dudley*, 64 F. (2d) 745

(C. C. A. 9); *United States* v. *Burke*, 50 F. (2d) 653; *United States* v. *Lesher*, 59 F. (2d) 53.

Competent witnesses testified without objection, that petitioner at the crucial time (1918 and since) was insane, (R. 44-46, 99). That a lay witness can testify as to the sanity or insanity of a person has long been established. *Connecticut Mutual Life Ins. Co.* v. *Lathrop*, 111 U. S. 612, 4 S. Ct. 533; 28 L. Ed. 536; *Corrigan* v. *United States*, 82 F. (2d) 106 (C. C. A. 9), *United States* v. *Woltman*, 57 Fed. (2d) 418 (App. D. C.)

We have here direct positive evidence of John J. O'Neill who stated his observations of the insured in April or May of 1919, and also we have the opinion of Doctor E. M. Wilder, a recognized psychiatrist who (R. 96-97) stated that the insured was insane in April or May of 1919, assuming that the observations of the witness, O'Neill, were true. Doctor Wilder testified (R. 109) that the probability is the insured will be insane for the rest of his life. This mental condition has existed since prior to the lapse of the insured's contract which occurred May 31, 1919.

It was aptly stated by a Federal district judge, in a war risk insurance case (*McGovern* v. *United States*, 294 Fed. 108, affirmed 299 Fed. 302, Cert. dis. 267 U. S. 608):

> "As permanency of any condition (here, total disability) involves the element of time, the event of its continuance during the passage of time is competent and cogent evidence."

This petitioner was denied by the Court of Appeals the most favorable inferences which should be drawn from this testimony. Clearly, the court below placed upon this testimony inferences most favorable to the defendant below and substituted its opinion in weighing the facts for that of the jury, thus violating the 7th Amendment, and the rule enunciated by this Court in *Gunning* v. *Cooley, supra.*

As was said by the court in *United States* v. *Newcomer*, 78 F. (2d) 50, where there was a substantial work record:

> "* * * His mental condition prevents him from working as other human beings work. He is not monarch of his mind. There is lack of coordination between his mind and his body, and as said by us in Asher v. United States (C. C. A. 8) 63 F. (2d) 20, 23:
>
> "'True, the record shows that insured has been able to do some work. He could do some work like the ox of the field, when guided and directed, but not as an intelligent human being. * * *'"

The weight to be accorded this testimony was for the jury to pass upon. Here every element which is usually pointed out in opinions as making against the claim of total and permanent disability is absent; those which make for it, present.

Upon admitted facts, if reasonable men might differ as to whether the insured was totally and permanently disabled the question was for the jury. Here facts were in dispute which were assumed by the Court below less favorable to petitioner than the evidence warranted.

Conclusion.

It is respectfully submitted that for the reasons stated herein the judgment of the Circuit Court of Appeals holding that there was not substantial evidence of total and permanent disability should be reversed.

Respectfully submitted,

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APPENDIX.

Period prior to May 31, 1919:

John J. O'Neill, 53 years of age, who worked with the insured, before he was granted insurance, as a steel boat worker, and before the insured entered the Service (R. 20), testified the insured then was the picture of health and there was nothing wrong with him mentally.

John Tanikawa, who served in the same squad with the insured, going overseas and thereafter, testified (R. 42): He became nervous after reaching France, was irritable, and picked fights with other soldiers which was a different condition than was observed before he left the United States.

He was sentenced by summary court martial February 2, 1918, (R. 121) to be confined at hard labor for two months and forfeit two-thirds of his pay each month.

Walter J. Wells, who served with him (R. 32) heard him hollering, screeching, swearing and causing a disturbance late one night in April, 1918, shortly after arriving in France.

In June 1918, late one night while serving with his Machine Gun Squad on outpost duty, facing the Germans on the banks of the Marne River in France, he became violently insane (R. 44) making it necessary for the other soldiers of his squad to gag him so that he would not give their position away to the Germans on the opposite side of the river. His lieutenant suffered a black eye when he attempted to quiet him (R. 40).

That night, however, one couldn't talk to him, Tanikawa testified, because he was out of his mind (R. 46) and appeared to be insane. Thereafter he was court-martialed (R. 45).

He would disobey his officers and during the Argonne battle he "acted queer" (R. 45).

This behavior, Dr. E. M. Wilder, a recognized neuropsychiatrist, testified showed a typical case (R. 98) of acute hallucinations and elusions derived from a typical case of dementia praecox. From an occupational standpoint (R. 99), assuming the facts in evidence to be true, the insured

was insane since July 1918 and unable to adapt himself, this witness testified.

He was admitted to receiving hospital September 24, 1918, remaining there 101 days because of influenza (R. 121).

At time of discharge on April 28, 1919 (R. 122), he was apparently only given a physical examination. A proper inference is that he was not given a mental or neuropsychiatric examination at this time, as the medical examiner only certified that he gave the insured "a careful physical examination."

Period after May 31, 1919:

In April or May 1919 when the insured returned home from service after the World War, John J. O'Neill, a neighbor, and lifelong friend, observed that (R. 17) the insured "was a wreck compared to what he was when he went away" and that his mind appeared to be unbalanced.

Mr. O'Neill testified further (R. 17):

"* * * he would get off in a corner by himself and he would get like crying spells. Another time you would meet him and he would appear to be all right. He would talk sensible, the same as anybody else would maybe the next day or for a couple ow days, and then he would go off and wander again with a lot nonsensical talk. For instance, you would be talking to him and we would try to cheer him up, and one thing and another, and there would be a couple of fellows across the street that would do anything for him, good friends of his, and he would be talking about them, that they wanted to beat him up when they got a chance, and that kind of nonsense."

He would walk over to the curb (R. 18) and spit blood and say "There is that gas". This was observed a dozen times. And this witness observed him every day during 1919 after he returned from the Service. He would try to get the insured out of his mood but he would observe him sitting in a back room crying, after he had been home a couple of months in the early part of 1919. The insured would curse and swear and say "I must be a Dr. Jekyll and Mr. Hyde". He would cry for a couple of hours (R. 19).

Mr. O'Neill testified (R. 19) that the insured had an idea later, about two years, that Grover Bergdoll was a friend of his and that he wanted to get in touch with him in reference to the pot of gold that Bergdoll told the Government he had hidden.

This witness testified that for the five years following the insured's return from the Service (R. 19) that there would be as many as three or four days a week when the insured would keep himself clean and carry on ordinary conversation, but then "there would be a couple of days when evidently his mind would drift and he would splabber around the mouth here and he didn't bother shaving or nothing." These periods were irregular, sometimes two days one way and then two days another. "Sometimes he would go for a couple of months all right" (R. 20). Sometimes he was competent and sometimes he was not during the time that Mr. O'Neill saw him (R. 21). When the insured first returned from the Service he "would go a few days, a little off, and then a few days himself" (R. 21).

Mr. O'Neill distinctly remembered the contrast between the insured's condition when he returned and when he went away (R. 24) and he saw the insured very often. The witness heard a rumor that the insured reenlisted in either the Army or the Navy (R. 25) but he did not see how that would be possible on account of insured's mental condition.

Mr. O'Neill stated that during the five years following April or May, 1919, the insured at times would not appear to be in a normal mental condition (R. 27). And that the insured's mental condition was clearly impressed upon him due to the great contrast in his conduct. As he expressed it, "sometimes he would be totally off his mind" (R. 29).

The witness stated that the first impression he had of the insured when he reurned from the Service was "He was in a fog. The next day he was terrible. We thought then that he would never be right, and then after that he straightened up for a few days, and then he would vary."

Dr. E. M. Wilder (R. 96, 97) stated that assuming Mr. O'Neill's observations to be true, after the insured first came back from France, in April or May 1919, he was then insane.

The insured entered the Navy on January 15, 1920, although apparently not given a mental examination at that time (R. 122, 123). He was then courtmartialed April 30, 1920, for being absent from his station and duty without leave and was then given a bad conduct discharge from the Navy on May 19, 1920.

An officer who observed him during this period of service, Commander Comfort B. Platt, stated (R. 57):

"I recall that he caused considerable trouble to the Commanding Officer by disobedience of orders and jumping ship and matters along that line. After repeated warnings and punishments, leading to court martials I believe he was finally sentenced by a summary court martial for a bad conduct discharge from the U. S. Navy."

This witness further stated that the insured was not amenable to discipline and received a bad conduct discharge.

Colonel Albert K. Mathews, Chaplain, U. S. Army, noticed while the insured in 1920 was a patient in the mental ward at the Fort MacArthur Hospital, he was mentally deranged and would usually be found abnormally depressed and then excitedly launch into a discussion of what, to his understanding, was discrimination on the part of the military authorities in failing to give him a disability discharge. It was difficult to divert his mental processes during these conversations.

At the time this witness first met the insured he was a prisoner in the mental ward of the hospital "by reason of the fact that he was under charges of violation of either the 58th Article of War, which concerns desertion, or the 61st Article of War, which concerns absence without official leave," and was also under mental observation (R. 50).

At that time while confined both as patient and prisoner, insured seemed to have no interest in army life in general, and had no apparent interest in anything outside of his own claim, (R. 51) and could not apparently concentrate on any other subject (R. 52). A mental breakdown was indicated because of his feeling that he was being mistreated to the point of martyrdom; this without any justi-

fication in fact (R. 52). The insured had the general appearance of one mentally exhausted (R. 52).

Colonel Mathews stated that he had observed the insured in the early part of 1920, (R. 53) and then he considered him to be irrational (R. 53), and of unsound mind (R. 56).

Dr. E. M. Wilder (R. 99) stated that assuming Colonel Mathews' observations to be correct, that the insured was definitely insane in 1920.

The insured reenlisted in the United States Army December 7, 1920. At that time he was given a general physical examination (R. 126) and the Army Captain who made the examination stated that he correctly recorded the results of the examination but his recordation thereof does not show that the insured was given a mental examination at that time, although the Captain signed a statement that he was mentally and physically qualified for service.

He was courtmartialed for misconduct January 27, 1921, and then on August 6, 1921, he was dropped from the rolls as a deserter. He was then restored to duty without trial November 28, 1921, having surrendered to military authorities on November 1, 1921.

Lt. Colonel James E. Matthews, U. S. Army, the insured's commanding officer in the first part of 1921, stated that during the summer of 1921 (R. 72, 73) the insured was so undependable that it was necessary to discipline him; and he received a summary court martial because of his misconduct.

Lt. Colonel Matthews further stated that at times the insured smelled of liquor and at other times when he could not smell liquor, it was believed the insured was using dope (R. 76). The insured seemed to believe he was not treated fairly, and could not be depended upon, would be absent from reveille, at times would talk incoherently (R. 78), would have alternate periods of excessive cheerfulness and rather lifelessness (R. 79). Men in his company feared him because he would fight; and he was considered a bad influence (R. 79). This witness further stated (R. 80) that "he acted just like I had noticed other men that I know to be addicts to drugs".

Dr. E. M. Wilder, stated (R. 110) that his desertions from the Service and other conduct showed he was guided purely by personal desires, without any thought of the bearing of his conduct on the outside world (R. 110).

The physical examination report of the Veterans Bureau at San Francisco, California, May 10, 1930, (R. 84, 85) stated in its conclusion that insured was "Moron, low grade; observation, dementia praecox, simple type," which Dr. E. M. Wilder stated means that he was a man of limited mentality, and that the report recommended further observation for a diagnosis of dementia praecox.

The Report of Neuropsychiatric Examination at Palo Alto Hospital, California, dated November 16, 1931, stated that "It is practically impossible to get any definite information from patient." (R. 85), and further that there was tremor of extended fingers; impairment of sensation on right side; right facial muscles weak; right hand grip slightly weaker than left yet insured is right-handed; Romberg is positive; that insured loses his base going backward and at times somewhat to the right; that there is some overlapping in the coordination test of finger to nose and finger to finger equally; and definite speech defect on test phrases (R. 86).

Dr. E. M. Wilder stated that a certain amount of incoordination, like the inability to touch your nose or the end of your fingers, is evidence of lack of complete control of muscular sense and is capable of various interpretations and could be caused by a disturbance of the central nervous system (R. 87).

At that time the insured had a very poor memory for events either recent or remote, and did not seem to care whether his answers were correct or not, and became irritable quite often. He was unable to repeat four figures. While denying the existence of enemies, he admitted he thought people watched him and for that reason seldom went out unless accompanied by his wife (R. 89). The insured denied that he ever thought his food was poisoned or that he felt electric currents pass through his body. Insured cannot control minds of others nor can his mind be controlled. Insured has paranoid trend toward mother-

in-law saying that she tries to run his business and is responsible for his being in hospital.

He was arrested on way to Regional Office (R. 88) and fined $5.00. At first he denied hallucinations then later intimated he heard voices but admitted they might be children on the street.

The report further stated insured was emotionally slow, dull, indifferent and decidedly unstable. It is difficult for insured to focus attention on anything (R. 89).

The insured's mental activity was very much lessened and Dr. E. M. Wilder stated that this indicated the insured to be suffering from some form of dementia (R. 89) and that this is part of his picture of dementia praecox.

The report further stated: "Has no ideas for the future and appears absolutely indifferent to himself and the world in general" (R. 89) and stated "Diagnoses: Psychosis with other diseases or conditions, (organic disease of the central nervous system—type undetermined)." Dr. Wilder explained that "Psychosis" meant insanity (R. 92).

The report stated that "Case was presented to staff conference on November 16, 1931 and the staff agreed to the diagnoses given above. Patient is considered psychotic and incompetent" (R. 92). This, Dr. Wilder explained was the same as saying the man was incompetent and insane. The report further stated that the insured should not resume his former occupation (R. 92).

An examination of the insured conducted by Dr. Bert S. Thomas, designated medical examiner for the Veterans Administration, at Sacramento, California, July 30, 1934, (R. 93) indicated that the brain, spinal cord, peripheral nerves and mentality of the insured were not normal; that while in a quiet stage the insured had normal intelligence; that insured had a poor memory both for remote and recent events; he was thoroughly oriented but has history of wandering off and not knowing where he is for days; that he goes from excitable resentful stages into sorrowful tears; that when in the excitable stage his attention cannot be held; that insured sometimes becomes rather vicious, fighty, is likely to break up furniture; that insured looked to all intents a killer type; that insured had definite delusions of

oppression at times; and "Patient is incompetent" (R. 93).

The above report included a diagnosis of "Psychosis-manic and depressive insanity incompetent" (R. 93); and that insured should have an attendant for travel (R. 94); that "Claimant mentally incompetent. Guardian necessary."

Dr. Wilder said in comment upon Dr. Thomas' statement that the insured looked like a killer, "any man that has delusions of persecution is potentially dangerous" and that he agreed with Dr. Thomas that insured should be hospitalized.

Dr. E. M. Wilder stated (R. 95) that one exhibiting insured's characteristics could not work at an ordinary job or hold it as he would feel none of the responsibilities imposed by the position as a normal man would; that he would not do anything he did not want to do; that when a man breaks down mentally "the first thing you know he is out of a job, • • • and then he begins to believe that everybody has got something in for him."

John Tanikawa, who had served with the insured in France, and met him again at the D. A. V. Post in Sacramento in 1936, stated that he had talked to the insured and that he appeared "like he wasn't all there" and that he should say the insured was insane (R. 48); and that the insured then appeared about the same as he had in France when he had to be bound and gagged and that his mentality seemed about the same (R. 48).

Dr. E. M. Wilder testified that he had examined the insured a few evenings previously and that he believed the insured to be suffering from a "schizophrenic branch or form of præcox" or "dementia præcox" and that insured was insane (R. 62).

Dr. Wilder further stated that the insured could not appear as a witness (R. 62) and "the type of disability that • • • makes him perfectly disregardful of what he does, so he doesn't understand the impact of the outside world on his interest or any interest of any kind, he is likely to tell you anything."

Dr. Wilder said (R. 63) that Mr. O'Neill's testimony that the insured was "neat as a pin" before he went in the Army

and his slovenliness when he came home was a manifestation of the fact that he was no longer interested in the outside world and its effect on himself; and that when the insured would say that certain persons wanted to beat him up when in reality they were old friends of the insured, was another example of a tendency to delusions of persecution (R. 64); and that when Dr. Wilder had asked the insured why he did not work and support himself he received the reply "All these fellows are down on me and won't give me a job."

Dr. Wilder stated that while it was part of routine examination in a mental case to determine if patient had ideas of persecution, one wouldn't waste time on it if the man had maniacal fits of manic depression (R. 64).

Dr. Wilder stated that Mr. O'Neill's observations of the change in personality of the insured in that upon return home from the Service he devoted all his thoughts to himself, and was indifferent to everything, was a condition frequently found in a case of dementia præcox (R. 65); and that he himself had observed the witness' behavior as he sat in the courtroom, paying no attention to a matter of utmost importance to him, gazing at his feet, twiddling his thumbs, and not concerned with anything. These were all part of the picture of a lack of reason which disqualified him for any common employment.

Dr. Wilder stated he had asked the insured why he kept losing jobs and was told "Why, they give me orders and I won't take orders from anybody, and I just quit." and that dementia præcox cases are incapable of continuous employment (R. 65).

Referring to the deposition of John O'Neill and the testimony of John Tanikawa, Dr. Wilder stated that the præcox cases usually had an inborn fragility, like a badly-built house which appeared good until a big wind hit it when it would crack open, and that it would be reasonable to assume that had the insured not been subjected to great strain he might have gone through life without cracking up (R. 66). And that it is hard to tell exactly when the breakdown occurred, whether the crude conditions of military life, the crossing on the "Aquatania" or what it was; but that be-

ginning with little spells of anger, etc., the insured went downhill and is still going downhill. Also that a normal man does not go insane under conditions of adversity. And that the incident on the firing line described by Mr. Tanikawa when the insured yelled "The Germans are coming", when no one could find any Germans, is an extreme example of emotional instability. "He blew up under a strain that did not blow anybody else up on the same squad, and on the same duty" (R. 67).

Dr. Wilder testified (R. 67) that the testimony of Chaplain Mathews was a further example of the insured's delusions of persecution—the insured's complaint about the type of discharge he had received; that Chaplain Mathews' observation that the insured had no interest except in himself was a sign of mind failure because of the limited field of interest; and that delusions of persecution makes some dementia præcox cases extremely dangerous in homicidal forms because they are defending themselves against the delusions that someone is going to hurt them.

Dr. Wilder said that the testimony of Lt. Colonel Matthews concerning the conduct of insured while under his command showed part of the picture of a person suffering from dementia præcox, and that such persons are not at all dependable (R. 69).

Dr. Wilder stated (R. 109) that it cannot now be said that a dementia præcox case is curable, even though certain cases have responded to experimental shock treatments, etc., and that the probability is that the insured will be insane for the rest of his life; and his condition at time of trial was permanent and reasonably certain to last throughout his lifetime.

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